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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 544

HARRY BERGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The trial court's charge to the jury appears at R. 463–487. The opinion of the Circuit Court of Appeals (R. 513–516) is reported in 73 F. (2d) 278.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered November 13, 1934 (R. 517). The petition for a writ of certiorari was filed November 26, 1934, and granted January 7, 1935 (R. 519). The jurisdiction of this Court rests upon Section

240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED[1]

1. Whether, on the facts of this case, proof of two conspiracies when only one was alleged constituted a material variance, requiring that petitioner's conviction be set aside.

2. Whether corroboration was required of the testimony of a codefendant used as a Government witness.

3. Whether the conduct of the District Attorney constituted prejudicial error.

STATUTES INVOLVED

The pertinent statutory provisions will be found in the Appendix, *infra*, pp. 40–42.

STATEMENT

An indictment in nine counts was returned against the petitioner and seven others in the District Court of the United States for the Eastern District of New York (R. 3–21). The only count

[1] In its brief in opposition to the petition for writ of certiorari (pp. 3–6) the Government suggested that it was open to doubt whether the bill of exceptions was signed and filed in time and therefore whether the questions presented by the petition were reviewable in this Court. A reply to the Government's brief was filed on behalf of the petitioner upon this point. The contentions of the parties with reference to the question are, we believe, sufficiently discussed in those briefs to permit disposition of the question, and we therefore do not feel that it would serve any useful purpose to indulge in any further discussion of the question here.

with which we are here concerned is the ninth count, which charged the petitioner and his seven codefendants with conspiring together and with persons to the grand jurors unknown, to possess and conceal, with intent to utter and pass, and to utter and pass, circulating notes of the Federal Reserve Bank of Dallas, Texas, of the denomination of twenty dollars and circulating notes of the Federal Reserve Bank of Chicago, Illinois, of the denomination of one hundred dollars, the defendants knowing that the notes had been counterfeited (R. 18–19). Four overt acts in pursuance of the conspiracy were charged (R. 19–21).

The petitioner and the defendants Rice and Jones were convicted upon the conspiracy count (R. 488). The defendant Katz became a witness for the Government pursuant to an agreement with the prosecuting attorney that if he would testify for the Government and his testimony was truthful, the United States Attorney would accept a plea of guilty upon the conspiracy count and enter a *nolle prosequi* as to the eight substantive counts of the indictment (R. 93–94).[2]

Upon the substantive counts of the indictment the petitioner was either acquitted by the jury or was successful in securing a dismissal (R. 204, 488). The petitioner was sentenced to imprisonment for a period of a year and a day upon the conspiracy

[2] Katz was subsequently arraigned, pleaded guilty to the conspiracy count of the indictment, and was sentenced to imprisonment for two years and to pay a fine of $100 (R. 25).

count (R. 489). He alone of the defendants appealed to the Circuit Court of Appeals (R. 491–499).

The bill of exceptions in this case covers over six hundred and fifty pages of the printed Record but only a comparatively small portion of the evidence contained therein relates to the petitioner. The principal witness against the petitioner and the other defendants was the defendant Katz. While he was, as the court ~~well~~ also pointed out, an ex-convict and in some respects a rather unreliable person (R. 513), his story was in various particulars corroborated by the testimony of other witnesses, including the petitioner and his codefendants. (See point II, pp. 32–36, *infra*.) In broad outline and omitting nonessential details, it was possible for the jury to have reached the conclusion from the evidence of Katz and other witnesses that the following facts had been proved:

The defendant Rice was in the jewelry engraving business in New York City (R. 99, 363). He had in his employ as a clerk in his office the defendant Lee, as to whom the indictment was dismissed because of the insufficiency of the evidence (R. 204). In the spring of 1933, Katz, who had known Lee while both were in Sing Sing Prison, met Lee in New York City (R. 97). Shortly thereafter, or according to Rice in June 1933, Katz was introduced to Rice through Lee (R. 98, 375). Rice told Katz about some beer labels Rice was making and told him that if he got out and sold them to brew-

eries, he would pay Katz a commission on them (R. 99–100). Katz then got into trouble and was sent back to Sing Sing for a violation of his parole (R. 100, 375). When he was released in November 1933 he went to see Rice at his office (R. 100). Rice told Katz that he "had an idea where he could make some money, taking ads out of newspapers, people advertising * * * rings and different things", for sale and that he "could go over and buy the ring and give him this money." (R. 101.) The money referred to was counterfeit money (R. 101). The bills shown Katz by Rice were twenty and one hundred dollar bills (R. 102). With the counterfeit money furnished him by Rice, Katz bought two rings which he turned over to Rice (R. 144, 117–120).

One of the counterfeit bills furnished by Rice was passed by Katz at a doctor's office in payment for professional services, and the change given Rice (R. 90–91, 103). It would also appear that Rice passed a counterfeit bill in a clothing store and that he had tried to get Katz to pass another at the same store. (R. 84–85, 87, 154–156, 365–370.)[2]

Katz first met Berger after the latter was released from Sing Sing in November 1933 in an apartment in New York City occupied by several girls. This was apparently around the middle of December 1933 (R. 110, 112, 234). Shortly before Christmas of that year Berger spoke to Katz about

[2] Rice knew that his clerk, the defendant Lee, was an ex-convict, and at some stage of his dealings with Katz was informed by Lee that Katz had served time in prison (R. 369).

counterfeit money. He said that one of the girls had told him that Katz had counterfeit money and asked to see one of the bills. Katz got one of the one hundred dollar bills and showed it to him, and Berger said it looked pretty good (R. 112). Berger then introduced the defendant Jones to Katz (R. 112, 394–395, 406–407).[4]

Jones asked Katz whether he could give him a few of the counterfeit bills. Katz called Berger aside and told him he did not know Jones and asked what type of fellow he was, as he did not want to take a chance of getting arrested if he gave him the bills (R. 113). Berger told Katz that Jones was "O. K., not to worry about it, the fellow would never say anything." Jones told Katz he intended to pass the bills on the bookmakers at hockey games in Madison Square Garden. Katz thereupon agreed to bring some bills to the apartment the following night. He did so, bringing four one hundred dollar counterfeit bills which he had gotten from Rice. Katz, Berger, and Jones went into a bathroom where Katz gave Berger the bills and Berger gave them to Jones. For the four one hundred dollar counterfeit bills Berger gave Katz one hundred dollars in good money, which he got from Jones (R. 113–114).

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[4] Berger had known Jones for about three and one-half years (R. 234), and apparently before he introduced Jones to Katz had attempted to assist Jones in negotiating for the purchase of a soda fountain and luncheonette located in a dance hall (R. 37, 241–242).

One of the counterfeit bills purchased by Jones was passed by him upon the proprietor of the soda fountain and luncheonette in the dance hall referred to in footnote 4 (R. 34–36). Another one of the bills was passed by Jones at a clothing store (R. 46–50).

Petitioner admitted in his testimony that some ten years before he had pleaded guilty to the charge of robbery in the third degree (R. 233), and that subsequently he had failed to reveal in applications to obtain a pistol permit, a real estate brokerage license, and to become a notary public, that he was an ex-convict (R. 264, 265, 266, 269).

At the close of the Government's case, counsel for the petitioner made a motion to dismiss the indictment as against him. This motion was granted as to six of the substantive counts and denied as to two of those counts and as to the conspiracy count (R. 204). At the conclusion of the entire case counsel for petitioner moved for dismissal of the indictment against petitioner on the ground that there was no credible evidence to support it, and also upon the ground, with respect to the conspiracy count, "that the evidence adduced, without in any way appraising its value or its weight or its credibility, fails to support the charge of conspiracy set forth in that count of the indictment", citing *Tinsley* v. *United States*, 43 F. (2d) 890 (C. C. A. 8th) (R. 420–421). He also moved for a directed verdict of acquittal (R. 421).

These motions were denied (R. 421), and after the jury had returned its verdict that petitioner was guilty upon the conspiracy count (R. 488), counsel for petitioner moved to set aside the verdict upon the grounds made at the close of the Government's case and at the close of the entire case, including the ground "that the evidence on the conspiracy count failed to establish the conspiracy alleged in the indictment", citing the *Tinsley* case. This motion was denied (R. 488).

SUMMARY OF ARGUMENT

I

The conspiracy count of the indictment charged in general terms a conspiracy to possess, conceal and utter certain described counterfeit bills. The evidence showed the existence of two conspiracies of the kind alleged—one between Katz and Rice, and the other between Katz, Berger, and Jones. There was no evidence to connect Berger with the conspiracy between Katz and Rice, although it appeared that both conspiracies had to do with counterfeit money furnished Katz by Rice. The court below conceded that there was a variance between the indictment and the proof, but held it immaterial.

It is clear that if the proof had shown only one conspiracy, failure to connect all those charged would not have constituted a material variance. Moreover, if two conspiracies had been proved, but

the indictment had identified one to the exclusion of the other, those guilty of the one identified could have been convicted. Here the indictment failed to identify either conspiracy to the exclusion of the other, and it has been held that in these circumstances the variance is fatal. We submit, however, that cases so holding fail to meet the recognized tests for materiality of variances.

By the great weight of authority, a variance is not regarded as material unless it tends to mislead and embarrass the defendant in preparing his defense or exposes him to the danger of being twice placed in jeopardy for the same offense. Here the petitioner was put on notice that he must be prepared to meet proof showing that he conspired with any or all of his codefendants, and the nature of the alleged conspiracy was plainly indicated. The mere fact that Rice was eliminated from the larger conspiracy cannot have misled the defendant, for if Rice had been proved wholly innocent the petitioner's conviction could not have been set aside. How, then, can it matter that Rice was not wholly innocent, but was guilty of another conspiracy to which the petitioner was not a party?

There is no danger that the petitioner will be placed twice in jeopardy for the same offense. Should the Government attempt to try him again for conspiring with Katz and Jones, it would have to resort to the evidence produced at the first trial, and the petitioner could successfully plead the

former conviction. If he were reindicted for conspiring with Rice, the Government would not be permitted to set up the variance between its own indictment and proof at the first trial (unless the petitioner's conviction had been set aside on account of such variance), and the petitioner could show that he had already been found guilty of that offense. See *United States* v. *Ball*, 163 U. S. 662.

Moreover, the court below was clearly right in holding that the petitioner was not prejudiced by having Rice's case tried with his. The principal witness against the petitioner was Katz, and Rice's testimony not only failed to corroborate that of Katz in any material respect, but in fact tended to show that Katz was wholly unreliable. While evidence of Katz's relations with Rice was incompetent as against the petitioner, it gave no added weight to the evidence tending to connect the petitioner with Katz and cannot have harmed him.

Technical rules regarding pleading and proof are no longer looked upon with favor. Statutes in England and in many of our States have liberalized the rules as to variance in both civil and criminal cases, and such statutes have been broadly construed. The Federal statutes permit amendments to pleadings in civil cases, and while the Constitution precludes this remedy in criminal cases, substantially the same purpose is accomplished by the provision in Section 269 of the Judicial Code, as amended (*infra*, p. 41) that in both civil and criminal cases judgment shall be rendered " without

regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties." Taking this statute as a guide, the court below, after examining the record, concluded that the petitioner's " substantial rights " had not been prejudiced. We submit the decision is sound and should be affirmed.

II

The petitioner also contends that it was error to sustain a conviction based largely on the testimony of Katz, an accomplice and a confessed criminal. It appears to be well settled in the Federal courts that corroboration of the testimony of an accomplice or co-conspirator is not necessary, provided, at least, that the trial judge properly cautions the jury regarding the weight to be given to statements made by such a person. This was done in the instant case, and it was then for the jury to determine the credibility of the testimony. There is no rule requiring corroboration of the testimony of an ex-convict. Moreover, Katz's testimony as to the petitioner was corroborated by evidence of statements made by the petitioner himself before the trial.

III

The final contention of the petitioner is directed to alleged misconduct on the part of the Assistant United States Attorney in connection with the examination of witnesses and in his summation to the jury. We think the court below was right in

holding it not sufficiently improper "to compromise the essential fairness of the trial" (R. 516).

ARGUMENT

I

THE VARIANCE BETWEEN THE INDICTMENT AND THE PROOF AS TO THE CONSPIRACY COUNT IS NOT MATERIAL AND THEREFORE DOES NOT WARRANT REVERSAL OF THE JUDGMENT AGAINST THE PETITIONER

The petitioner and seven others were indicted in nine counts, of which eight charged the substantive offenses of possessing and concealing with intent to utter, and uttering, certain counterfeit money, knowing the same to be counterfeit, and the ninth charged conspiracy to commit the offenses described in the first eight counts. At the close of the Government's evidence motions to dismiss the indictment as to four of the defendants for failure of proof were granted. (R. 203, 204.) The petitioner's motion to dismiss was granted as to the first six counts, and he was held for trial on the last three. (R. 204.)

The ninth count, which is the only one involved here, charged in general terms a conspiracy between the defendants and other persons to the grand jurors unknown to possess, conceal, utter and pass, counterfeit twenty and one hundred dollar bills. It did not specify the manner in which the bills were to be passed, the persons to whom they were to be passed, or the parts to be played by the several members of the alleged conspiracy. Dismissal of the indictment as to four of the defend-

ants left Rice, Katz, Berger, and Jones as the only defendants as to whom the conspiracy count ~~was~~ could be submitted to the jury. Rice, Berger, and Jones were convicted by the jury on the conspiracy count; Katz pleaded guilty to that count.

As is indicated by the summary appearing at pages 4–7, *supra,* the evidence was that a conspiracy was entered into between Rice, the counterfeiter, and Katz, an ex-convict, for the disposition of counterfeit bills to be supplied by Rice. The plan which first occurred to Rice and Katz was to pass the counterfeit money on persons advertising in the newspaper rings and "different things" for sale, but the *modus operandi* soon expanded, for the evidence showed that Katz passed one of the bills at a doctor's office in payment for professional services and that Rice passed another bill at a clothing store. It is thus apparent that the Circuit Court of Appeals took too narrow a view of the evidence when it said that the arrangement between Katz and Rice contemplated a "limited use of the bills; that is, to buy rings" (R. 514).

The petitioner did not enter the picture until after the formation of the conspiracy between Rice and Katz. It appears that he learned that Katz had counterfeit money, and we then see him asking to be shown the bills, finding them satisfactory, introducing Jones to Katz, vouching to Katz for Jones' trustworthiness, and finally acting as a conduit for the transfer of the bills from Katz to Jones and for the delivery of good money in re-

turn from Jones to Katz. Thus the evidence tends to show a conspiracy between Katz, Berger, and Jones. It also shows a conspiracy between Katz and Rice. The difficulty with the proof is that it fails to connect the two conspiracies, as the court below observed, except insofar as it shows that Katz was a party to both and that both had to do with the utterance of counterfeit bills furnished by Rice. There seems to have been nothing from which the jury could find that the petitioner, when he had dealings with Katz and Jones, was aware of Rice's interest in the counterfeit money or knew that Katz was engaged in a conspiracy with any other person. Rice testified that Katz had never told him about Berger and that he had never heard of Berger before the case started (R. 385–386), and although the Circuit Court of Appeals stated that Jones was acquainted with Rice (R. 514), we are unable to find any testimony to that effect.

The petitioner's contention is that the proving of two conspiracies, where only one was charged, gave rise to a fatal variance between indictment and proof, which required that the petitioner be acquitted by direction of the court. The Circuit Court of Appeals conceded, as do we, that there was a variance, but held it not material on the ground that the petitioner was not prejudiced. We submit that this decision is correct.

If the proof had only shown one conspiracy, under the settled rule in the Federal courts failure

to connect all of those charged would not have constituted a material variance. *Hardy* v. *United States*, 256 Fed. 284 (C. C. A. 5th), certiorari denied, 250 U. S. 659; *Meyers* v. *United States*, 36 F. (2d) 859 (C. C. A. 3d), certiorari denied, 281 U. S. 735. Moreover, it would appear that if the proof shows two conspiracies and the indictment identifies one of them to the exclusion of the other, those guilty of the one identified may be convicted, although those guilty of the other must be acquitted. *Parnell* v. *United States*, 64 F. (2d) 324 (C. C. A. 10th). While the indictment in the instant case was broad enough in language to include either of the conspiracies proved, it must be admitted that it does not identify either conspiracy proved to the exclusion of the other, and it must also be admitted that at least two of the decisions relied upon by the petitioner and cited in the opinion below seem to hold that under such circumstances the variance is fatal. *Tinsley* v. *United States*, 43 F. (2d) 890 (C. C. A. 8th); *Marcante* v. *United States*, 49 F. (2d) 156 (C. C. A. 10th). We believe, however, that these decisions overlook the criteria which determine whether a variance is or is not material.

In *Bennett* v. *United States*, 227 U. S. 333, this Court said (p. 338):

> * * * * the essential thing in the requirement of correspondence between the allegation * * * and the proof is that the record be in such shape as to inform the defendant of the charge against her and to

protect her against another prosecution for the same offense.

The test of materiality of a variance thus stated by this Court accords with principles generally recognized and applied by other courts, both State and Federal. See *Harrison* v. *United States,* 200 Fed. 662 (C. C. A. 6th); *Kercheval* v. *United States,* 36 F. (2d) 766 (C. C. A. 5th), certiorari denied, 281 U. S. 745; *United States* v. *Wills,* 36 F. (2d) 855, 856 (C. C. A. 3d); *Smith* v. *United States,* 50 F. (2d) 46, 47 (C. C. A. 8th); *Burke* v. *United States,* 58 F. (2d) 739, 741 (C. C. A. 9th); *Harris* v. *People,* 64 N. Y. 148; *People* v. *Boneau,* 327 Ill. 194, 205; *People* v. *Harrington,* 92 Cal. App. 245, 254–255. The proposition was clearly expressed in *Williams* v. *United States,* 3 App. D. C. 335, where the court said (p. 344):

> The requirement of law, that the allegations and proofs in a cause shall be conformable each to the other, and that there should be no variance between them, is intended to subserve two purposes: 1st. That a defendant should be distinctly and specifically advised of the charges against him, so as to enable him properly to make his defense, and that he should not be taken by surprise in the testimony at the trial; 2d. That the judgment in the case might be pleaded with effect in any subsequent suit for the same offense or the same specific cause of action. * * *

Applying these criteria to the facts of the instant case, it is difficult, in the first place, to see how the petitioner could have been in any way misled in making his defense because the conspiracy charged in the indictment split up in the proof into two conspiracies. Eliminating those defendants as to whom dismissals were entered by the court, the indictment charged specifically that the petitioner not only conspired with defendant Rice, but also with Katz and Jones. There was ample proof of the conspiracy between the petitioner and Katz and Jones. Assuming Rice to have been wholly innocent of any conspiracy, it would be clear under the authorities cited that the petitioner's conviction must stand. Thus it must be taken that a defendant is not necessarily misled when the evidence establishes that some of those with whom he is alleged to have conspired were not participants in the common scheme. How, then, can it matter that the proof disclosed that Rice was not wholly innocent, but was guilty of a different conspiracy from that to which the petitioner was a party? The indictment seems clearly to have been broad enough to sustain a conviction on either of the two conspiracies, had the other not been proved, and we submit it cannot be said that the petitioner was not fully advised of the nature and identity of the alleged offense. Seldom can a defendant know precisely what the proof will show, but it must have been evident to the petitioner that he must be prepared to defend against proof

that he conspired with any one of those named to conceal and utter the counterfeit money described in the indictment. This being so, we submit that the variance cannot be regarded as material on the ground that it confused or misled the petitioner in respect of the offense with which he was charged.

There remains the question whether the variance was such as to expose the petitioner to the danger of being twice placed in jeopardy for the same offense. If the record will enable the defendant to show on a second prosecution that the same evidence is required to sustain the charge as was necessary to support the first prosecution, it is obvious that he is amply protected against the risk of double jeopardy. *Gavieres* v. *United States*, 220 U. S. 338, 343. If, despite the petitioner's conviction in the instant case, the Government should attempt to place him on trial a second time for the conspiracy with Katz and Jones, manifestly it would have to resort to the same evidence that it produced at the first trial, and the petitioner would be able to prevent a second trial by pleading the former conviction. Should the Government attempt to place the petitioner on trial under a second indictment charging that he conspired with Rice, the petitioner could show that the first indictment charged a conspiracy with Rice and that the jury must be taken to have found him guilty of conspiring with Rice because it returned a verdict of guilty against both. Moreover, parol evidence may be

offered, to show that the charges are identical. *Bartell* v. *United States*, 227 U. S. 427, 433.

While it is true that a defendant may not secure an acquittal on the ground of a variance and then escape trial upon a second indictment charging a conspiracy framed in the light of the proof adduced at the first trial (*United States* v. *Wills*, 36 F. (2d) 855 (C. C. A. 3d); *Meyers* v. *United States*, 36 F. (2d) 859 (C. C. A. 3d), certiorari denied, 281 U. S. 735), the Government is clearly not in a position to place a defendant on trial upon a general conspiracy with others, secure a conviction, and then allege in support of its second indictment that it was entitled to try the defendant again because the evidence at the first trial showed a variance between the allegations and the proof. This principle is recognized in the decision of this Court in *United States* v. *Ball*, 163 U. S. 662.

In that case Ball and two others were placed on trial upon an indictment which undertook to charge murder. Ball pleaded not guilty and made no objection to the indictment as being insufficient. He was acquitted. The other two defendants were convicted and on writ of error secured a reversal of their conviction because the indictment was defective. A new indictment was returned not only against these two defendants but also against Ball. Ball pleaded former jeopardy and this Court held that his plea was good. As showing the injustice which would follow in such a situation if the Gov-

ernment were permitted to take advantage of its own mistake, the Court quoted with approval from the leading case of *People* v. *Barrett*, 1 Johns. 66, as follows (pp. 667–668):

> In the leading American case of *People* v. *Barrett*, 1 Johns. 66, while a majority of the court, consisting of Chief Justice Kent and Justices Thompson and Spencer, followed the English authorities, Justices Livingston and Tompkins strongly dissented, and their reasons were fully stated by Mr. Justice Livingston, who, after distinguishing cases in which upon the first trial there had been no general verdict of acquittal by the jury, but only a special verdict, upon which the court had discharged the defendant, as well as cases in which the defendant himself had suggested the imperfection in the first indictment, and thereupon obtained judgment in his favor, said: "These defendants have availed themselves of no such imperfection, if any there were, nor has any judgment to that effect been pronounced. This case, in short, presents the novel and unheard of spectacle, of a public officer, whose business it was to frame a correct bill, openly alleging his own inaccuracy or neglect, as a reason for a second trial, when it is not pretended that the merits were not fairly in issue on the first. That a party shall be deprived of the benefit of an acquittal by a jury, on a suggestion of this kind, coming too from the officer who drew the indictment, seems not to comport with that universal and humane

principle of criminal law, 'that no man shall be brought into danger more than once for the same offence.' It is very like permitting a party to take advantage of his own wrong. If this practice be tolerated, when are trials of the accused to end? If a conviction take place, whether an indictment be good, or otherwise, it is ten to one that judgment passes; for, if he read the bill, it is not probable he will have penetration enough to discern its defects. His counsel, if any be assigned to him, will be content with hearing the substance of the charge without looking farther; and the court will hardly, of its own accord, think it a duty to examine the indictment to detect errors in it. Many hundreds, perhaps, are now in the state prison on erroneous indictments, who, however, have been fairly tried on the merits. But reverse the case, and suppose an acquittal to take place, the prosecutor, if he be dissatisfied and bent on conviction, has nothing to do but to tell the court that his own indictment was good for nothing; that it has no venue, or is deficient in other particulars, and that, therefore, he has a right to a second chance of convicting the prisoner, and so on, *toties quoties.*" 1 Johns. 74.

As to the two other defendants who secured a reversal of the conviction, this Court held that their plea of former jeopardy could not be maintained (pp. 671–672).

* * * because it is quite clear that a defendant, who procures a judgment against

> him upon an indictment to be set aside, may be tried anew upon the same indictment, or upon another indictment, for the same offence of which he had been convicted. * * *

See also *Kepner* v. *United States*, 195 U. S. 100, 126 *et seq.*

The analogy between the situation in the instant case and that in the *Ball* case seems to us amply sufficient to show that the Government would not be permitted to assert, if it attempted to try the petitioner upon another indictment for conspiring with any one of the conspirators named in the present indictment, that it was entitled to do so because of the variance disclosed by the proof here.

In affirming the judgment of conviction the Circuit Court of Appeals based its decision principally upon the ground that the variance was not fatal because the petitioner was not in anywise prejudiced by having Rice's case tried with his. It said (R. 516):

> * * * No doubt, strictly speaking, the evidence of Katz's trafficking with Rice was incompetent; but it was certainly harmless to Berger. Katz had to get the bills from someone unless he printed them himself; the fact that he got them from Rice gave no weight to his word; indeed, rather the contrary, because Rice was an added witness to his untruthfulness. His [Katz's] association with Rice, even if Rice was a proven

> counterfeiter, did not taint Berger. We can see nothing else of which Berger can complain; * * *.

The court accordingly held that the case was one falling within the amendment of February 26, 1919, to Section 269 of the Judicial Code (*infra*, p. 41), which directs appellate courts in both civil and criminal cases to "give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

If the court had desired to elaborate the point that Berger was not harmed because his case and Rice's were tried together, it could have pointed out that the strongest evidence against the petitioner was that given by Katz, and that Rice's testimony in no way corroborated Katz insofar as the latter's statements regarding the petitioner were concerned. Rice not only stated that he was not acquainted with the petitioner, but also swore that Katz had never mentioned Berger's name to him. Moreover, Rice repeatedly controverted the testimony given by Katz in other respects, denying that he ever had counterfeit money in his possession or had given any to Katz (R. 364), that he ever went to Brooklyn with Katz or had anything to do with the purchase of a ring from Mrs. Piccione (R. 383), that he had ever given Katz a share of the proceeds of the counterfeit currency (R. 383–384),

and so forth. A careful reading of the record discloses only a few instances in which Rice corroborated Katz's testimony in any respect: he admitted that he met Katz through Lee (R. 375), that Katz had been to his office (R. 367), that he had twice met Katz at Roth's Restaurant (R. 368) and that Lewis, the haberdasher, had accused him of giving him a counterfeit bill, although he denied that he had done so (R. 365–366). These, however, were relatively unimportant details, which it would have been difficult for Rice to deny, and which had no tendency to connect Berger with Rice or Katz. The burden of Rice's testimony was to the effect that Katz had told a mass of falsehoods and was a thoroughly unreliable witness. Thus Rice, as the court below observed (R. 516), was an added witness to Katz's untruthfulness, and his testimony tended to impeach the Government's most damaging evidence against the petitioner.

Admittedly, the evidence of Katz's dealings with Rice was incompetent as against the petitioner, but it can hardly have harmed him. Katz had confessed his own guilt, about which there was little room for doubt. Evidence regarding Katz's relations with Rice added no weight to the evidence tending to connect Katz with the petitioner.

We submit, therefore, that the mere fact that Rice and the petitioner were tried together, although it developed that they were not members of the same conspiracy, does not call for reversal of the conviction.

The decision below reflects the modern tendency on the part of courts and law-making bodies to liberalize the old technical rules of pleading and proof. Holdsworth in his *History of English Law*, Vol. IX, pp. 304–307, points out that under the mediaeval system when the pleadings were oral and the modern practice of summoning witnesses to testify to the facts was unknown, the doctrine of variance had no place in the law. That doctrine had its birth with the system of written pleadings. Under this system, as Holdsworth states, "The pleadings were closed and the issue was settled before the parties got into court; while the truth of the facts alleged in the pleadings was proved or disproved by the witnesses summoned to testify. Thus it might easily happen that the facts as proved did not support the facts as alleged in the pleadings—there was a variance. And a variance, however slight, might prove fatal to the success of the party who had all the substantial merits on his side." He then points out the arbitrary way in which the doctrine of variance operated, as explained by the Common Law Procedure Commissioners in 1830. He says for example, that if in an action for a false charge of felony, when the declaration stated that the defendant went before Richard Cavendish, Baron Waterpark of *Waterfork*, a Justice of the Peace, and falsely charged the plaintiff with the felony, and it appeared in evidence that the charge was made before Richard

Cavendish, Baron Waterpark of *Waterpark*, this variance was considered fatal, and the plaintiff was nonsuited.

Other similar examples are set out by Jones in his *Commentaries on Evidence*, 2d Edition, Vol. 2, Sec. 864, pp. 1572-1573. To meet this difficulty, the practice arose of stating the cause of action in the plaintiff's initial pleading in several different ways, in several distinct counts, in order to meet every contingency in the proof. This gave rise to a redundancy of pleading which had apparently never theretofore been paralleled, and while the device of multiple pleadings helped to some extent to counteract the extraordinary severity of the rules as to variance, it was not always successful, and Holdsworth states that, "In 1830 it was said that this doctrine was 'one of the most frequent sources of miscarriage in the suit.'"[5]

The harshness of the old rule has, however, been largely done away with in most jurisdictions by statutes making liberal provisions for amendments, thereby preventing, as Jones says (Sec. 867, p. 1577) "the injustice that flowed from technical enforcement of the old rule, under which parties were often nonsuited, or the real point at issue left un-

[5] In footnote 2 to this statement it is said: "This kind of objection [variance] is naturally looked out for by a party whose case has no foundations on the merits, and is consequently of very frequent occurrence; so that, notwithstanding the protection from it afforded by the use of several counts and pleas, it is one of the most frequent sources of miscarriage in the suit." Parlt. Papers 1830 xi 35.

determined and the parties excluded from all further remedy, because of zealous application of the variance rule without corresponding liberality in curative amendments." Jones further states (Sec. 867, p. 1577) that "A series of acts have been passed in England abrogating the old rules in both civil and criminal cases," and that "Similar statutes have been adopted throughout this country." See also Jones, Sec. 868, p. 1579.*

In line with such statutes are those which direct that errors and defects in the pleadings or other proceedings which do not affect the rights of the adverse party shall be disregarded. Jones states (Sec. 868, pp. 1579–1580) that "With scarcely a single dissent the authorities hold that these statutes should be liberally construed by the courts to further the ends of substantial justice," citing numerous cases. (Footnote 18 to Sec. 868, p. 1580.)

While there is a provision in the Federal statutes with reference to civil cases, permitting the

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* There is a historical discussion of the changes made by statute in the law of variance in both civil and criminal cases in England in a note to *Bristow* v. *Wright*, 1 Smith's Leading Cases, part 2, 8th Am. Ed., pp. 1417–1444. Reference is made in this note also to some of the American decisions. See also *Nash* v. *Towne*, 5 Wall. 689; note to *Stevenson* v. *Mudgett*, 34 Am. Dec. 155. See also *People* v. *White*, 22 Wend. 167, 175, where the subject of variance in indictments is examined. Smith says as to this case (p. 1444) that "*People* v. *White* was reversed by the Court of Errors, 24 Wend. 520, not because the general principle of variance laid down was wrong but because the application of it in that case was mistaken."

courts of the United States to allow amendments in the process or pleadings at any time upon such conditions as may be prescribed (R. S. Sec. 954, U. S. C., Title 28, Sec. 777), there is, of course, no such provision with respect to criminal proceedings because an indictment or presentment returned by a grand jury of the United States cannot be amended under the Constitution by an order of court. (*Ex parte Bain*, 121 U. S. 1.)

But substantially the same purpose is accomplished in criminal cases by the provision of the Act of February 26, 1919, amending Section 269 of the Judicial Code (Appendix, *infra*, p. 41), which directs that in criminal cases as well as in civil cases judgment shall be given "after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties." Designed to prevent the defeat of substantial justice, this statute like the statutes permitting curative amendments in civil cases should be given a liberal construction.

The petitioner has been convicted on proof amply sufficient to support the verdict. The technical error of which he complains did not affect his "substantial rights." Consequently, we submit, the decision below is sound and should be affirmed.

It must be conceded that other courts have regarded proof of two conspiracies as fatal when the indictment charged only one, irrespective of

whether substantial prejudice was apparent in the particular case. Certain of the decisions cited by the petitioner and by the court below disclose facts not present here which might well serve to distinguish them from the instant case. Others, however, are difficult, if not impossible, to differentiate.

In *Parnell* v. *United States* and *Hays* v. *United States,* 64 F. (2d) 324 (C. C. A. 10th) two conspiracies to violate the Prohibition Act were proved though only one, county-wide in scope, had been alleged. The evidence showed the existence of a county-wide conspiracy such as was described in the indictment, and Parnell was found to have been involved in it. The court, however, concluded upon a rehearing that there was not sufficient evidence to connect Hays with that conspiracy, although it appeared that he had conspired separately with Parnell. It accordingly reversed the judgment against Hays, while affirming the conviction of Parnell. The basis of the decision as to Hays appears to have been that the indictment charged a conspiracy to violate the prohibition laws in a particular manner, namely, with the connivance and assistance of the local law enforcement officers, whereas Hays was merely conspiring with Parnell to operate a still and knew nothing of the arrangements for protection. Thus the case was one in which the indictment described one conspiracy to the exclusion of the other instead of describing both, as in the present case. Acquittal of Hays on

the charge of conspiracy to violate the law in the particular manner specified would, we submit, have furnished no bar to a subsequent prosecution for conspiring with Parnell to operate the still, for the proof required to sustain the second charge would not include the element of connivance with officers of the law which was necessary to justify conviction under the first indictment. Hence the variance was properly held to be material.

Dowdy v. *United States* and *Funk* v. *United States,* 46 F. (2d) 417 (C. C. A. 4th), involved a closely analogous state of facts. There, however, the second conspiracy proved not only failed to come within the terms of the indictment, but was shown to have taken place in a State other than that in which the indictment was laid. It will be observed that in neither case was the proof of two conspiracies held to be a fatal variance in respect of the defendants who were shown to have been guilty of the offense described in the indictment.

In *Siebricht* v. *United States,* 59 F. (2d) 976 (C. C. A. 2d), as the court below observed, the evidence proved two entirely disconnected conspiracies, one of which was outlawed by the statute of limitations. Since the parties to both conspiracies were the same and the nature of the conspiracies similar, there was a danger that the jury might convict on the proof relating to the outlawed conspiracy, though the evidence as to the other offense were insufficient. Thus there was possibility of

serious prejudice which rendered the variance material. See *United States* v. *Baker*, 61 F. (2d) 469, 470 (C. C. A. 2d).

Terry v. *United States*, 7 F. (2d) 28 (C. C. A. 9th) is more like the instant case, but still we think it is not wholly analogous. There the indictment charged a conspiracy which was identified as having occurred at or near a certain place and at a specified time. Evidence was admitted, over objection, that two of the defendants had violated the liquor laws at a totally different place approximately six weeks earlier, and the court instructed the jury that they might consider that evidence as tending to prove the conspiracy charged and as showing that overt acts had been committed. This was held error on the ground that the two offenses were entirely different, and the court further observed that, "Proof that the plaintiff in error was guilty of another crime was in itself prejudicial * * *" (p. 30).

It would serve no useful purpose to examine the facts of all the other cases cited. Whether or not they disclose grounds for distinction, it is nevertheless true that the courts appear to have accepted the "absolute doctrine" which the court below declined to adopt. We submit that the reasoning of tl court below is to be preferred.

II

THE JURY WAS ENTITLED TO CONVICT THE PETITIONER UPON THE UNCORROBORATED TESTIMONY OF KATZ IF IT BELIEVED HIS TESTIMONY. THERE WAS, HOWEVER, CORROBORATION OF THAT TESTIMONY, AND ALTHOUGH NO REQUEST WAS MADE BY THE DEFENDANTS THE JURY WAS INSTRUCTED THAT IT SHOULD RELY UPON KATZ'S TESTIMONY ONLY IF IT FOUND IT TO BE CORROBORATED

The Government's principal witness against the petitioner was Katz. The petitioner contends that Katz's testimony was not corroborated and that he should not have been convicted upon this uncorroborated testimony because Katz was an ex-convict and his accomplice. While this point was not discussed in the opinion below (R. 513–516), and was not covered by the assignments of error appearing in the record (R. 491–499), we submit that it is without merit.

There can be no question that a convict is now a competent witness in a criminal trial in a Federal court. *Rosen* v. *United States*, 245 U. S. 467. See also *Funk* v. *United States*, 290 U. S. 371. While his prior conviction may be given due consideration by the jury in determining the credibility and weight of his testimony, the petitioner does not refer to any rule which requires the corroboration of the testimony of a convict, and we know of no such rule.

Even though he was an accomplice, the jury was clearly entitled to convict the petitioner on Katz's testimony alone if it believed him. In *Caminetti* v. *United States*, 242 U. S. 470, 495, this Court said:

> It is urged as a further ground of reversal of the judgments below that the trial court did not instruct the jury that the testimony of the two girls was that of accomplices, and to be received with great caution and believed only when corroborated by other testimony adduced in the case. We agree with the Circuit Court of Appeals that the requests in the form made should not have been given. In *Holmgren* v. *United States*, 217 U. S. 509, this court refused to reverse a judgment for failure to give an instruction of this general character, while saying that it was the better practice for courts to caution juries against too much reliance upon the testimony of accomplices and to require corroborating testimony before giving credence to such evidence. While this is so, there is no absolute rule of law preventing convictions on the testimony of accomplices if juries believe them. 1 Bishop's Criminal Procedure, 2nd ed., § 1081, and cases cited in the note.[1]

The record in the instant case shows that "no requests to charge were submitted to the Court in accordance with the rules." (R. 463.) Nevertheless, the court, in accordance with the practice suggested in the *Holmgren* and *Caminetti* cases, did charge the jury as follows (R. 473–474):

> You have here the evidence, when you get beyond the point of the passing of the money

[1] See also 2 Bishop's New Criminal Procedure, 2d ed., p. 994 and cases cited.

by Jones you have here the evidence of Katz. Katz concededly is a several-times-convicted offender against the law, a man who has been punished by penal servitude, a man who was a defendant in this action. I am going to speak of him now once and for all as far as that is concerned, and this applies to all his testimony as to all the defendants. He is a man who concededly is going to receive consideration for coming here and telling his story. The Government must find its witnesses where it may. It could hardly be expected that the inside story with reference to any aggregation engaged in the passing of counterfeit money would come from highly reputable citizens. Katz is here before you. Katz, if he is telling the truth, is an accomplice. Katz' testimony must be considered carefully in view of all the facts. The fact that Katz went to States Prison does not say that his testimony cannot be considered at all. Katz is not now on trial. He is here as a witness. The fact that he went to States Prison as a defendant convicted in a criminal case entitles you, and it is your duty in weighing his testimony, to determine whether you would give the same weight and credence to the testimony of a man who had been convicted of a crime that you would to a person who had lived a blameless life. Considering his testimony carefully because of his alleged association with this transaction and with the defendants, considering the fact that he is an ex-convict, what are the facts and circumstances proven

> by witnesses other than Katz? Do they corroborate, do they lend support to the truth of his story, or do they not? Taking the testimony of people who are not convicts or ex-convicts, taking the testimony of people who have no records, is there corroboration of Katz? That is for you to say. It is for you to determine if that testimony supports his story, shows to you that his story is in part true, from which you may go further and determine whether it is all true, or what part is true, or whether it is all false, or what part is false.

No exception was taken to this charge (R. 486–487), and we submit that it fully protected the petitioner.

While we contend that even though it be assumed that there was no corroboration of Katz's testimony the petitioner's conviction must stand, we think that the record discloses ample corroboration of such testimony. As the Circuit Court of Appeals pointed out (R. 513), Katz was "corroborated as to Berger by some admissions made after Berger's arrest, and to some extent by witnesses who had seen Berger in Jones's company before Jones passed the bills." To mention but one important point as to which Katz's testimony was fully corroborated: Katz testified that he was introduced to Jones by Berger in an apartment in New York City occupied by several girls (R. 112). Two Secret Service Agents, who worked on the case, testified unequivocally that each of them

heard Berger say that he had brought Jones to the girls' apartment and introduced him to Katz (R. 394–395; 406). Other instances in which Katz's testimony agreed in various particulars with that of other Government witnesses and also with the petitioner's own testimony will be found at R. 85, 88, 91, 103, 108, 154, 164, 166, 173, 236, 261, 363, 367.

While petitioner denied the testimony of Katz when he took the stand, he does not disclose any inconsistencies in that testimony which would tend to impair its credibility, and it should be remembered that in comparing the testimony of Katz and the petitioner the jury was confronted with the fact that the petitioner was also an ex-convict and that he had failed to reveal that fact in applications to obtain a pistol permit, a real estate brokerage license and to become a notary public (R. 233, 264–267, 269).

III

THE PETITIONER WAS NOT DEPRIVED OF A FAIR AND IMPARTIAL TRIAL BY THE CONDUCT OF THE ASSISTANT UNITED STATES ATTORNEY

The final contention of petitioner addresses itself to alleged misconduct on the part of the Assistant United States Attorney in examining witnesses and in his remarks to the jury. When the instances upon which petitioner relies are considered in their record setting, and not in isolation, coupled with the admonitions given by the trial court from time to time, and the following final

instruction to the jury, we think it clear that no possible prejudice is shown to have occurred (R. 471, 486):

> Let us start out with this proposition, that whatever counsel may have said to you was the evidence given by any witness, whatever I may say to you was the evidence given by any witness, is simply our recollection. That does not control you. It is your recollection of the evidence which has been given which is controlling. If there be any doubt in your mind as to the evidence of any witness on any point, you may have that read to you by the stenographer, if you shall require it.
>
> Gentlemen, before we go into a further discussion there was in the summation yesterday a little dispute between some of the counsel as to their personal relations. Let me say to you that has no place in this trial. Counsel are not on trial, and whether they like each other or dislike each other is a matter of absolutely no importance. We are not here determining any differences that they may have between each other. The people on trial here are the three defendants, and you will decide the case on the evidence that has been given here, not on any differences that there may be between counsel.
>
> * * * * *
>
> Gentlemen, without any sympathy, without any prejudice, without any bias, decide this case, * * *.

> Take the case and decide it as your oath requires you to do upon the evidence, upon the instructions of the Court, drawing from the evidence reasonable inferences which you have a right to draw, but determining the case on the evidence not on speculation.

The general rule is that juries are presumed to follow the instructions of the court, and the record here presents nothing to indicate that the jury in the case at bar disregarded those instructions. *Fairmount Glass Works* v. *Coal Co.*, 287 U. S. 474, 485; *Pennsylvania Co.* v. *Ray*, 102 U. S. 451, 459; *Parmagini* v. *United States*, 42 F. (2d) 721, 724 (C. C. A. 9th), certiorari denied, 283 U. S. 818.

Four judges below found that no prejudice ensued from the behavior of the Assistant United States Attorney, and we submit that the petitioner has not sustained the burden of establishing that he was deprived of a fair and impartial trial. See *Harris* v. *United States*, 71 F. (2d) 532 (App. D. C.), certiorari denied, October 8, 1934, under No. 209; *Salerno* v. *United States*, 61 F. (2d) 419 (C. C. A. 8th); *Caminetti and Diggs* v. *United States*, 220 Fed. 545, 555–557, affirmed, 242 U. S. 470; *Horowitz* v. *United States*, 262 Fed. 48, 51 (C. C. A. 2d), certiorari denied, 252 U. S. 586; *Silkworth* v. *United States*, 10 F. (2d) 711, 721 (C. C. A. 2d), certiorari denied, 271 U. S. 664: *Dunlop* v. *United States*, 165 U. S. 486, 498.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be affirmed.

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JOSEPH B. KEENAN,
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FEBRUARY 1935.

APPENDIX

Section 37 of the Criminal Code (U. S. C., Title 18, Sec. 88) provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

Section 149 of the Criminal Code (U. S. C., Title 18, Sec. 263) provides:

> Whoever shall falsely make, forge, or counterfeit, or cause or procure to be made, forged, or counterfeited, or shall willingly aid or assist in falsely making, forging, or counterfeiting, any note in imitation of, or purporting to be in imitation of, the circulating notes issued by any banking association now or hereafter authorized and acting under the laws of the United States; or whoever shall pass, utter, or publish, or attempt to pass, utter, or publish, any false, forged, or counterfeited note, purporting to be issued by any such association doing a banking business, knowing the same to be falsely made, forged, or counterfeited; or whoever shall falsely alter, or cause or procure to be falsely altered, or shall willingly aid or assist in falsely altering, any such circulating notes, or shall pass, utter, or publish, or at-

tempt to pass, utter, or publish as true, any falsely altered or spurious circulating note issued, or purporting to have been issued, by any such banking association, knowing the same to be falsely altered or spurious, shall be fined not more than $1,000 and imprisoned not more than fifteen years.

Section 151 of the Criminal Code (U. S. C., Title 18, Sec. 265) provides:

> Whoever, with intent to defraud, shall pass, utter, publish, or sell, or attempt to pass, utter, publish, or sell, or shall bring into the United States or any place subject to the jurisdiction thereof, with intent to pass, publish, utter, or sell, or shall keep in possession or conceal with like intent, any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more than $5,000 and imprisoned not more than fifteen years.

Section 269 of the Judicial Code as amended by the Act of February 26, 1919, c. 48, 40 Stat. 1181 (U. S. C., Title 28, Sec. 391) provides:

> * * * On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.

R. S. Sec. 1025 (U. S. C., Title 18, Sec. 556) provides:

> No indictment found and presented by a grand jury in any district or other court of the United States shall be deemed insuffi-

cient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant.

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